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In the
Supreme Court of the United States

OCTOBER TERM, 1955

No. 569

E. H. RISSER, ET AL.....PETITIONERS

v.

CITY OF LITTLE ROCK, ARKANSAS, ET AL
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Chancellor (Pet. 31) is unreported. The opinion of the Supreme Court of Arkansas (Pet. 55) is reported in The Law Reporter, Vol 99, p. 733, July 4, 1955, and 281 S.W.2d 949.

JURISDICTION

The judgment of the Supreme Court of Arkansas, court of last resort of the State, was rendered on July 4, 1955. A petition for re-

hearing was denied on October 3, 1955. The petition for a writ of certiorari was filed on December 14, 1955, and the time for filing a brief in opposition to the petition for certiorari was extended to and including February 6, 1956, by order of Mr. Justice Clark dated January 11, 1956. The jurisdiction of this Court is invoked under 28 U.S.C.A. 1257 (3).

QUESTION PRESENTED

Petitioners set out the Question Presented as follows (Pet. 2):

Is the constitutional guaranty of due process of law infringed by the act of a city taking, closing, and obstructing a dedicated street and right of way providing the only reasonable means of access of petitioners from their homes and property to the community, county, and state highway system generally and incorporating them within its airport, all of which is judicially determined to damage petitioners' property, without paying or making provision to pay for the damages to petitioners' property?

The Question may be more succinctly stated:

Does the relocation of dedicated streets by a city for the purpose of expanding the municipal airport amount to a taking of the property of non-abutting property owners, who are thereby required to travel a slightly longer route between their property and the city, for which the

due process clause of the Fourteenth Amendment to the United States Constitution requires compensation?

CONSTITUTIONAL PROVISION INVOLVED

Amendment Fourteen to the Constitution of the United States provides, in pertinent part:

> ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law: . . ."

STATUTE INVOLVED

The Arkansas statutory provisions involved are set forth in Sec. 19-2304, Arkansas Statutes, 1947. (Pet. 20).

STATEMENT

For the purpose of clarification of the nature of the city's action attacked by Petitioners, it should be here noted that the streets in question are being relocated, not absolutely abandoned. The extent of the relocation is reflected in the opinion of the Arkansas Supreme Court, *supra,* (Pet. 55):

> "In order to do this, the city seeks to abandon a small portion of East 10th Street and establish a new route one block north on 9th Street. This will require traffic to make two sharp turns in traveling from 10th to 9th Street. By actual timing, it takes 35 seconds longer to travel the new route than it does the old one. On the south side of the airport, the city has relocated East 26th Street for a distance of a

little over half a mile. This was done by building a crescent shaped loop which makes the new route approximately 600 feet longer than the old route. The old route is in such a condition that it cannot be traveled, hence the comparative time it takes to travel the two routes is not shown, but it requires a total of one minute and 15 seconds to drive the entire new route at a usual rate of speed."

ARGUMENT

I. THE FEDERAL QUESTION PRESENTED HAS BEEN DECIDED BY THIS COURT ADVERSELY TO PETITIONERS' POSITION.

This case was litigated in the Arkansas courts on Petitioners' contentions that the city failed to comply with the Arkansas statutory provisions in relocating the streets, and that a prior decision of the trial court was *res adjudicata* on the question of the city's right to take this action. Those questions were decided adversely to Petitioners in both of the state courts. The Arkansas Supreme Court further sustained the trial court's holding that Petitioners had suffered no damage, Mr. Justice Robinson speaking for the Court (Pet. 61): "None of the plaintiffs own property abutting on the portions of the streets being closed, *but even if it is conceded* that appellants have been damaged by the relocation of the roads, they have suffered no peculiar or special damages which could give

rise to a cause of action." (Italics supplied.) The foregoing *arguendo* concession of "damage" must be taken in context with the entire opinion to mean the general inconvenience suffered by the portion of the public which uses a particular public highway that results from any change in the existing route. The holding of the Arkansas Supreme Court in essence is that the consequential damage to Petitioners is, under Arkansas Law, *damnum absque injuria,* and this holding is supported by a clear line of Arkansas authority. See *Greer* v. *City of Texarkana,* 201 Ark. 1041, 147 S.W.2d 1004; *Tuggle* v. *Tribble,* 117 Ark. 296, 6 S.W.2d 312; *Stoutemeyer* v. *Sharp,* 89 Ark. 175, 116 S.W. 189; *Little Rock and Hot Springs Western Railroad Company* v. *Newman,* 73 Ark. 1, 83 S.W. 653; and *Wellbourn* v. *Davies,* 40 Ark. 83.

Petitioners fail far short of bringing this case within the area which would justify the granting of certiorari, as the only federal question that could be presented on this record has been decided by this Court. The decision of the Arkansas Supreme Court in the instant case is in accord with the holding of this court in *Meyer* v. *Richmond,* 172 U.S. 82, 43 L.ed. 374, 19 S. Ct. 106. In that case this Court held that consequential damage to property by an obstruction in a street is not a deprivation of the property within the constitional provision against de-

priving a person of property without due process of law. There the plaintiff's property abutted directly on the closed street, and *a fortiorari* the holding is governing here in the case of non-abutting property owners. This Court expressed its continuing approval of that holding when it denied certiorari in *Roberts* v. *Detroit,* 278 U.S. 566, 73 L.ed. 509, 49 S. Ct. 79, on the authority of *Meyer* v. *Richmond, supra.*

II. THE FEDERAL QUESTION WAS NOT RAISED IN, NOR PASSED ON BY, THE STATE COURT.

Even if Petitioners presented a federal question of substance not heretofore determined by this Court, this Court would be without jurisdiction to grant a writ of certiorari. It is settled law that when, as here, any right, privilege or immunity is specially set up or claimed under the Constitution as grounds for the granting of a writ of certiorari, the claim must be first asserted in the state court at the proper time and in the proper manner under the state system of pleading and practice. *Hartford L. Ins. Co.* v. *Johnson,* 249 U.S. 490, 63 L.ed. 722, 39 S. Ct. 336. At no point in the proceedings in the state courts did Petitioners bring such a claim to the court's attention in a manner adequate to apprise the court that there was before it a claim founded on federal law, nor did the Arkansas

Court, at any point, find it necessary to pass upon a federal question. Even on petition for rehearing to the Supreme Court of Arkansas, which this Court has held is too late to first assert the federal claim (*Herndon* v. *Georgia,* 295 U.S. 441, 79 L.ed. 1530, 55 S. Ct. 794), the only reference to such a federal claim is of such a general nature that it fails to meet the test of *Thomas* v. *Iowa,* 209 U.S. 258, 52 L.ed. 782, 28 S. Ct. 487, where it was stated, "Something more than this vague and inferential suggestion of a right under the Constitution of the United States must be presented to the state courts to give us the limited authority to review their judgments which exists under the Constitution. . . . A mere claim in the court below that there has been a denial of due process of law does not of itself raise a federal question with sufficient distinctness to give us jurisdiction to consider whether there has been a violation of the Fourteenth Amendment to the Constitution." Petitioners' concluding section of their Petition and Brief for Rehearing to the Arkansas Supreme Court, which is the only part of that document wherein any federal claim is mentioned, is reproduced as Appendix A to this brief. Reproduced as appendix B to this brief is Petitioners' Statement of Points to be Relied Upon from their original brief in that court, indicating the total absence of any federal claim.

CONCLUSION

The decision of the Supreme Court of Arkansas is correct; it is in accord with the applicable decisions of this Court; it presents no question of general applicability; and the federal question here presented was not raised in, nor passed on by, the state courts. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

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January, 1956

APPENDIX A

Section VI of Petitioners' Petition and Brief for Rehearing filed in the Supreme Court of Arkansas.

VI.

The Taking by the City Violates the Due Process Guaranteed by the Constitution of the United States

Our government is founded upon the principle of justice under law. As a basic element it is provided that no state shall deprive any person of property without due process of law.

The appellants in this case are being deprived of their property rights without remedy in violation of the due process of law guaranteed them. Their property is damaged materially. Their losses are serious. No such injury has been suffered by the public generally. The damage to appellants is special and of a different kind from that which the general public may receive.

The opinion in *Isgrig* v. *City of Little Rock*, decided by this Court unanimously on July 4, 1955, necessarily holds that plaintiffs in the Isgrig case had stated a cause of action; and that, on demurrer when the facts alleged are accepted as true, the plaintiffs in the Isgrig case were entitled to an injunction until damages had been paid. It must follow then, from the Isgrig case, that Chancellor Williams erred in holding that

only abutting property owners could be damaged.

In the instant case, the plaintiffs did not pray for money damages, but prayed instead that the city be enjoined from damaging them until it had actually paid damages. This is most important.

The plaintiffs in the instant case are not willing to surrender their damages for a useless judgment against the city or the Airport Commission. And any such judgment would be useless because neither the city nor the Airport Commission can pay damages.

This Court said in a similar situation:

> "While the property owner may not sue the state or the (Highway) Commission in its name for damages, he may restrain the Commission from taking his property until damages have been paid, or provision for payment made. If the property owner permits an agency of the state, such as the Highway Commission, to appropriate his property or damage same, he is limited to such relief as the state may provide. For the loss of his property, or for damage to it, he has an unliquidated demand against the state to be satisfied at the pleasure of the state." *Ark. State Highway Commission* v. *Bush, Judge*. 195 Ark. 920, 925.

To close the streets without paying the damages occasioned is a taking of property without due process and forbidden under both the State and Federal constitutions.

Appellants submit that this cause should be reheard by this Court, and that the decision of the lower court should be reversed and the case remanded.

Respectfully submitted,

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APPENDIX B

Statement of Points to be Relied Upon from Petitioners' original brief filed in the Supreme Court of Arkansas.

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STATEMENT OF POINTS TO BE RELIED ON

1. The City did not comply with the statutory requirement of securing approval from the Pulaski County Planning Commission.
2. The City had no control or jurisdiction to close the roads in question.
3. The City has failed to provide comparable roads that are equally safe and convenient.
4. The fact that the plaintiffs' property does not abut on the portion of the road closed does not prevent the plaintiffs from suffering damages for which they are entitled to reimbursement.
5. The court should have sustained the plaintiffs' plea of res adjudicata.